LAW | NEWS

Why lay advocates need to be regulated

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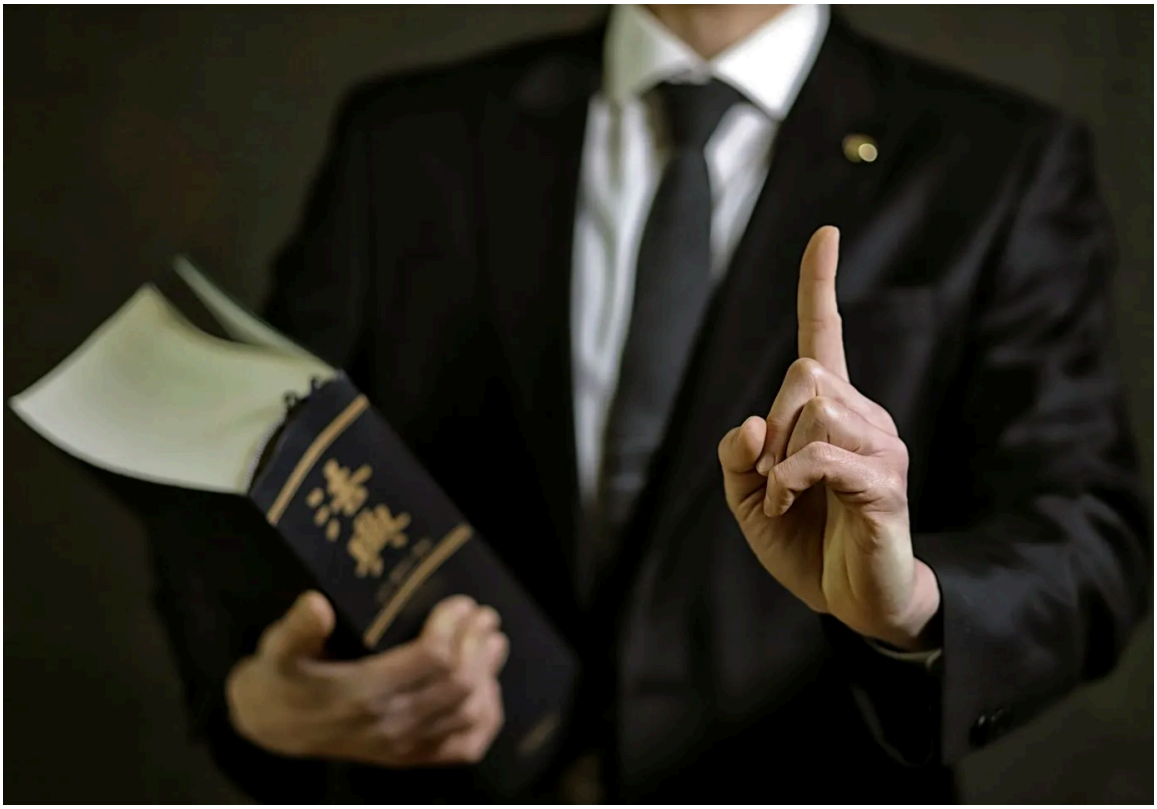

Michael Andrew

After years of lobbying, employment lawyers are urging the government to regulate client representation for employment matters, following the recent Employment Court ruling in *Joyce v Ultimate Siteworks Ltd* where the judge strongly criticised the "unprofessional" and "abusive" conduct of a lay advocate toward the opposing party's counsel.

David Fleming, counsel for Ultimate Siteworks, had raised with the court his concerns about the behaviour of Lawrence Anderson, who was acting as an advocate for Cody Joyce.

Fleming said Anderson had subjected him to "repeated acts of harassment", including abusive emails and late-night phone calls and texts, including one at 1.21am on the day the substantive hearing was scheduled to begin.

Anderson also posted one-star Google reviews of Fleming and of Ultimate Siteworks' previous advocate, using multiple accounts, Fleming said.


David Fleming

Judge Joanna Holden agreed that Anderson had behaved in an unprofessional and abusive manner but said the court had a limited ability to address his conduct due to a lack of rules for dealing with such incidents and because Anderson was not a lawyer and was therefore not subject to the disciplinary regimes and code of conduct governing lawyers' behaviour. Nor was he a member of the Employment Law Institute or the Arbitrators and Mediators Institute of New Zealand.

"It seems there is no applicable professional body to which the court can refer his

conduct. If Mr Anderson had been a member of such a body, this is a step I would have considered taking," Judge Holden said in her decision.

Longstanding concern


Catherine Stewart

Barrister Catherine Stewart, convenor of The Law Association's Employment Law committee, says the case highlights the seriousness of the issues posed by unfettered and unmanaged employment law representation.

"As a committee, we have a longstanding concern about the quality of service provided by some employment advocates. It's been an issue for many years, and this is one of a number of cases where the court has raised concerns about the conduct of advocates. I don't think we can say that this is an isolated incident. Clearly there is reason to have quite serious concerns about this issue which faces our profession and the employment law jurisdiction."

The employment advocate industry has grown substantially in the past two decades and claims to provide accessible legal services for clients who would otherwise struggle to afford a lawyer.

However, Stewart says issues arise because advocates are not subject to the same parameters or rules as lawyers, meaning they can resort to unconventional or inappropriate methods with impunity.

“They’re not subject to the code-of-conduct rules that we are subject to as lawyers which regulate our professional ethics and our standards. They’re not subject to requirements of an annual declaration for a practising certificate, and they’re not subject to compulsory continuing professional education requirements, which lawyers have to do.

“I don’t want to tar all employment law advocates with the same brush, but [the industry] is so unregulated and there’s such variation with their skill level and ethical behaviour that it is enough of a problem to say this is impeding the administration of justice.”

Hidden costs

While some advocates are trained professionals with law degrees or with sufficient experience in the legal sector, others lack the necessary knowledge to navigate the employment law jurisdiction and provide competent representation.

Stewart says this can mean clients face unforeseen costs.

“Some of them have law degrees, but probably the majority of them don’t, and so they may not have the knowledge of the law, and they may not have the knowledge of courtroom protocols and processes.

“If they’re not familiar with drafting and pleadings, evidence and discovery and interlocutory applications, it can escalate costs and create delays. We’ve heard horror stories about bad behaviour and overcharging.”

Although disruptions of hearings and poor conduct by advocates can affect lawyers, Stewart says the real victims are members of the public, many of whom are vulnerable people in precarious situations who don’t understand the services they have signed up for.

She says many clients approach advocates on the assumption they are trained lawyers who will represent them with the same level of care, ethics and proficiency.

“It’s an access-to-justice issue as it ultimately impacts the vulnerable members of our society who think that they are dealing with a lawyer,”

Stewart says. “So, there’s a consumer protection angle here as well, because the public isn’t informed enough to realise that there’s another tier of advocates who are non-lawyers.

“In our committee’s view, there needs to be proper informed consent and disclosure.”

Filling a gap

Although the lack of regulation is widely touted as the key issue to be addressed for advocates, another employment lawyer approached by *LawNews* acknowledged that they serve a valuable purpose and are a product of public demand for accessible legal services.

Graeme Colgan

Employment lawyer and former Employment Court Chief Judge Graeme Colgan says the lay advocate industry arose in response to changes to employment law in the 1980s and 1990s, which resulted in fewer trained union and employer association advocates who could represent clients in court.

This opened a gap in the market that was eventually filled by lay advocates operating as sole traders, unbound by organisations with distinct codes of conduct or standards.

“In the old system, the advocates were employed by a body to make sure that they were doing the best job, whereas now a lot of the employment advocates operate on their own.

“They do have their advantages for people who otherwise couldn’t afford representation. A number of them have law degrees. Some of them are former lawyers who either decided not to practise or have been told they can’t practise. So, they do have the training. But I guess there are a few bad ones that spoil it for the rest who generally operate well and appropriately.”

Colgan says there are two main areas where issues involving lay advocates can arise. The first is during Employment Relations Authority (ERA) or Employment Court proceedings, where an unskilled advocate unfamiliar

with certain details may slow down the process, compelling a member or judge to intervene and help.

This is problematic, as neither the ERA nor the court can be seen to be providing special treatment to an advocate – or anyone else, for that matter. It also impacts the client, who is most likely paying the advocate to perform his or her job well.

“Lawyers have to act in the best interests of the client. Advocates need to be reminded of that as well,” Colgan says.

The other area is outside the courtroom, where the ERA and Employment Court are unable to intervene – especially in the event of poor conduct.

“The [Joyce] judgment refers to abusive telephone calls an advocate made at two o’clock in the morning or three o’clock in the morning to the lawyer on the other side. That’s clearly bad behaviour, but it’s also behaviour that can’t be controlled by the court or the Authority.

“Some advocates just decide that any tactic is a good tactic, including bullying, knowing that there won’t be any repercussions for them if they do that.”

A few bad apples

While there is no over-arching organisation that can regulate the operation of all lay advocates or discipline them for poor conduct, there is a voluntary body – the Employment Law Institute – which oversees its members. However, because membership is not compulsory, it has a limited impact on the advocate industry as a whole.

“What you tend to find is that the good advocates are the ones who are members, while the ones who are badly behaving are not members. So that organisation has a disciplinary process, but if an advocate isn’t a member, then it has no power over them,” Colgan says.

One employment advocate who is a member of the Employment Law Institute is Ashleigh Fechney. Although she agrees that the industry needs to be regulated, she feels that most advocates are professional and competent and, like any industry, there are a few “bad apples” that spoil it for the rest.

“You’ve got to have a way to deal with those people. And the problem with employment advocacy is that we don’t have that,” she says.

Ashleigh Fechney

Although Fechney has a law degree and experience working at a law firm, she acknowledges there are other advocates who don’t have knowledge of complicated areas of the law that might be required at times. However, most advocates know their limit and are happy to refer matters on to specialist lawyers, she says.

Legislative change

The efficacy of the Employment Law Institute or any other body that seeks to regulate advocates depends largely on funding, and whether membership fees are sufficient to make the organisation viable while not being so high that they dissuade advocates from signing up.

The main alternative, and the solution that many employment lawyers have been pushing for over the years, is legislative change.

Stewart says her committee has emphasised the urgency of the issue several times to MPs over the past few years. If change were to happen, it would most likely involve changes to the Employment Relations Act which will clarify who is able to act as an advocate in employment law situations.

“How that change takes place is something that we’ve debated on many occasions, and there are many different views on that. It’s for the lawmakers to decide. It does seem to me that those concerns have been heard,” she says.

Colgan agrees that change needs to come in the form of a statutory government body that licenses and disciplines advocates, if necessary, through a code of conduct, similar to that which governs immigration consultants.

“Immigration consultants aren’t lawyers; they practise in a specialist field, but there are protections for their clients. They have to be licensed and subject to a disciplinary body if they misbehave.”

However, he says successive governments have been lobbied during the past decade and no meaningful change has occurred.

“Nothing’s happened yet. There’s still lobbying going on with the new minister, but who knows whether we will see similar legislation like that which manages the immigration field?

There’s been no progress so far.”

Brooke van Velden, Minister for Workplace Relations and Safety, has been approached for comment but has not yet responded.